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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 IN RE CELLCYTE GENETICS  
10 SECURITIES LITIGATION,

11 This Document Relates To:

12 All Actions

Case No. C08-0047RSL

13 ORDER GRANTING DEFENDANT  
14 PIERCE'S MOTION TO DISMISS

15 **I. INTRODUCTION**

16 This matter comes before the Court on defendant G. Brent Pierce's motion to  
17 dismiss plaintiffs' second amended consolidated class action complaint pursuant to Fed.  
18 R. Civ. P. 9(b) and 12(b)(6). Plaintiffs, who are attempting to represent a class of  
19 investors, contend that Pierce violated Sections 10(b) and 20(a) of the Securities and  
20 Exchange Act of 1934 and Securities Exchange Commission ("SEC") Rule 10b-5.  
21 Specifically, plaintiffs contend that Pierce was responsible for various alleged  
22 misrepresentations in a promotional brochure regarding CellCyte.

23 Pierce argues that plaintiffs have failed to identify any misrepresentations  
24 attributable to him, and that their allegations of scienter and loss causation do not satisfy  
25 the pleading standards of the Private Securities Litigation Reform Act of 1995

26 ORDER GRANTING DEFENDANT  
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1 (“PSLRA”), 15 U.S.C. §§ 78u-4 *et seq.* Pierce also contends that plaintiffs’ “control  
2 person” allegations are insufficiently pled and must be dismissed.

3 The Court heard oral argument in this matter on September 22, 2009. For the  
4 reasons set forth below, the Court grants the motion.

## 5 **II. ANALYSIS**

### 6 **A. The Complaint.**

7 Plaintiffs filed this action on behalf of all persons who purchased the publicly-  
8 traded stock of CellCyte Genetics Corporation (“CellCyte”) between July 16, 2007 and  
9 the date of this lawsuit. Plaintiffs also plan to seek class certification on behalf of  
10 purchasers of CellCyte securities between April 6, 2007 and January 9, 2008. Second  
11 Amended Consolidated Class Action Complaint (“SACC”) ¶¶ 28, 29. CellCyte described  
12 itself as an emerging biotechnology company engaged in the discovery and development  
13 of stem cell therapeutic products. *Id.* ¶ 3. CellCyte’s products would use a patient’s own  
14 cells to treat a variety of conditions non-invasively. The theory of the complaint is that  
15 defendants overstated the viability and availability of CellCyte’s products and the status  
16 of the company’s product development. Plaintiffs allege that when the truth emerged, the  
17 value of CellCyte stock plummeted.

18 In this action, plaintiffs have sued CellCyte, Pierce, Gary Reys,<sup>1</sup> and Ronald  
19 Berninger. Reys and Berninger co-founded CellCyte and served as company officers.  
20 Pierce, a Canadian citizen, is a stock promoter who has been banned from trading  
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22 <sup>1</sup> Plaintiffs also allege that CellCyte and the other defendants misrepresented Reys’  
23 educational and professional background (the “resume fraud”). CellCyte, Reys, and  
24 Berninger filed a separate motion to dismiss, and plaintiffs are in settlement negotiations  
25 with those defendants. Plaintiffs do not assert allegations against Pierce based on the  
26 resume fraud.

1 securities in Canadian exchanges, from acting as a director or officer of any publicly  
2 traded Canadian company, and from acting as a director or officer of certain issuers.

3 Plaintiffs allege that Pierce continued to operate as a stock promoter in  
4 Washington. He is the president of Stock Group, AG, a stock-promotion firm based in  
5 Zurich with an office in Bellingham. The SACC alleges that CellCyte paid a monthly  
6 consulting fee to Stock Group, AG to promote CellCyte. “Pierce and his company Stock  
7 Group, AG were behind a colorful twelve-page mailer distributed on or about October  
8 2007 to potential U.S. and foreign buyers of CellCyte stock entitled, ‘James Rapholz’s  
9 Economic Advice’” (the “Rapholz brochure”). SACC at ¶ 24. Plaintiffs allege that  
10 Pierce and Stock Group, AG drafted the brochure’s content and paid for its publication  
11 and distribution.

12 The SACC alleges that Pierce was the “primary author” of the Rapholz brochure.  
13 SACC at ¶ 79. Before the brochure was issued, Pierce submitted a Factual Information  
14 Review (“FIR”) document for review and approval. Reys reviewed the content and  
15 initialed each of the pages of the FIR. Id. at ¶ 79. After Reys conducted his review,  
16 plaintiffs allege that Pierce supplemented the brochure’s content with the following  
17 allegedly false statements:

- 18 ● “Now, a practical ‘pill-in-a-bottle’ application puts the miracle of  
19 regenerative medicine within immediate reach.” SACC at ¶ 83.
- 20 ● “The technology is real. It’s here now. It is heading into FDA testing.  
21 Because it’s based on safe, naturally occurring proteins, FDA fast tracking, if  
22 granted, could allow more rapid approval of this revolutionary treatment.” Id.
- 23 ● “Repair your own heart . . . regenerative medicine in on the verge of an  
24 enormous and historic leap forward.” Id.
- 25 ● “Grow-your-own repair tissues! . . . . In the not-too-distant-future doctors  
26 should be able to inject stem cells from the patient’s own body into a vein where  
the stem cells will target the heart to allow growth and repair of heart tissue.” Id.

1       ● CellCyte’s technology used a “patient’s own adult stem cells rather than  
2 controversial embryonic form.” Id. at ¶ 85.

3       ● “[I]n pre-clinical studies over 77% of the stem cells remained in place in the  
4 organ, compared to a mere 1 to 5% by current invasive methods. Id. at ¶ 86.

5       **B. Private Securities Litigation Reform Act.**

6       In 1995, Congress raised the pleading requirements in private securities litigation  
7 to deter the routine filing of shareholder lawsuits whenever a significant change in a  
8 company’s stock price occurred. Congress was particularly concerned with litigation  
9 based on nothing more than (1) speculation that the company “must have” engaged in  
10 foul play and (2) the faint hope that the liberal rules of discovery would turn up some  
11 supporting evidence. See Joint Explanatory Statement to the PSLRA, H.R. Conf. Rep.  
12 No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.N. 730. In order to state a claim under  
13 § 10b of the Exchange Act and Rule 10b-5 plaintiffs “must allege: (1) a misstatement or  
14 omission (2) of a material fact (3) made with scienter (4) on which [plaintiffs] relied (5)  
15 which proximately caused their injury.” DSAM Global Value Fund v. Altris Software,  
Inc., 288 F.3d 385, 388 (9th Cir. 2002).

16       Unlike most civil litigation, allegations sufficient to put defendants on notice of the  
17 nature of the claim are insufficient under the PSLRA: private securities plaintiffs must  
18 “specify each statement alleged to have been misleading, the reason or reasons why the  
19 statement is misleading, and, if an allegation regarding the statement or omission is made  
20 on information and belief, the complaint shall state with particularity all facts on which  
21 that belief is formed.” 15 U.S.C. § 78u-4(b)(1). In order to withstand a motion to dismiss  
22 under Fed. R. Civ. P. 12(b)(6), the complaint must, as to each act or omission alleged to  
23 violate the securities laws, “state with particularity facts giving rise to a strong inference  
24 that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). Thus,

1 private securities plaintiffs must “plead with particularity both falsity and scienter.”

2 Ronconi v. Larkin, 253 F.3d 423, 429 (9th Cir. 2001).

3 In In re Silicon Graphics Inc. Securities Litig., 183 F.3d 970, 975-77 (9th Cir.  
4 1999), the Ninth Circuit evaluated the requirements of the PSLRA, its legislative history,  
5 and the prior practice of the courts and determined that the required state of mind for  
6 purposes of § 78u-4(b)(2) is, at a minimum, a “deliberate recklessness” that reflects some  
7 degree of knowing misconduct. In order to give rise to a “strong inference” of “deliberate  
8 recklessness,” securities plaintiffs may no longer rely on evidence which suggests that the  
9 corporation and/or its officers had a motive and opportunity to defraud the market: rather,  
10 the complaint must allege, with particularity, “facts indicating no less than a degree of  
11 recklessness that strongly suggests actual intent.” 183 F.3d at 979. Recklessness is  
12 defined as “a highly unreasonable omission, involving not merely simple, or even  
13 inexcusable negligence, but an extreme departure from the standards of ordinary care, and  
14 which presents a danger of misleading buyers or sellers that is either known to the  
15 defendant or is so obvious that the actor must have been aware of it.” DSAM Global  
16 Value Fund, 288 F.3d at 389.

17 The Court recognizes that *Silicon Graphics* and its progeny make it very difficult  
18 for private securities litigants: in order to survive a motion to dismiss, plaintiffs must  
19 possess, at the time of filing, evidence that defendants had knowledge of, or were  
20 deliberately reckless regarding, the falsity of public statements at the time they were  
21 made.<sup>2</sup> Simply alleging that statements were knowingly false is not enough. Such

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23 <sup>2</sup> Plaintiffs can no longer file a claim and hope that discovery will provide the  
24 necessary proof:

25 In the absence of greater particularity and more incriminating facts, we have

1 allegations must be supported with references to the specific facts, documents, and/or  
2 reports. In order to determine whether the complaint gives rise to a strong inference of  
3 intentional or deliberately reckless conduct, the Court must assess the allegations  
4 “holistically,” along with plausible nonculpable explanations for defendant’s conduct.  
5 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 326 (2007). Although “[t]he  
6 inference that defendant acted with scienter need not be irrefutable . . . [it] must be more  
7 than merely ‘reasonable’ or ‘permissible’ – it must be cogent and compelling, thus strong  
8 in light of other explanations. A complaint will survive . . . only if a reasonable person  
9 would deem the inference of scienter cogent and at least as compelling as any opposing  
10 inference one could draw from the facts alleged.” Tellabs, 551 U.S. at 324. Thus, the  
11 PSLRA compels a rigorous analysis of the complaint to determine whether the  
12 allegations, taken collectively, give rise to a strong inference that defendant lied or was  
13 deliberately reckless.

#### 14 **C. Evidentiary Issues.**

15 In reviewing this motion to dismiss, the Court may consider the SACC, materials  
16 incorporated into the SACC by reference, and matters of which the Court may take  
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18 no way of distinguishing [plaintiffs’] allegations from the countless “fishing  
19 expeditions” which the PSLRA was designed to deter. See H.R. CONF.  
20 REP. 104-369 at 37.

21 Congress enacted the PSLRA to put an end to the practice of pleading  
22 “fraud by hindsight.” See, e.g., Medhekar v. United States Dist. Ct., 99  
23 F.3d 325, 328 (9th Cir. 1996) (holding that Congress intended for  
24 complaints under the PSLRA to stand or fall based on the actual knowledge  
25 of the plaintiffs rather than information produced by the defendants after the  
26 action has been filed).

Silicon Graphics, 183 F.3d at 988.

1 judicial notice. Metzler, 540 F.3d at 1061. Pierce has requested that the Court take  
2 judicial notice of the documents attached to the Declaration of Ann Bender in support of  
3 his motion to dismiss. Plaintiffs do not dispute the authenticity of the documents or  
4 object to the Court considering any of them. The attached consulting agreement between  
5 Stock Group, AG and CellCyte and the Rapholz brochure were both referenced in  
6 plaintiffs' SACC, so they are incorporated by reference. Pursuant to Evidence Rule  
7 201(b), the Court also takes judicial notice of the documents, as well as notice of the  
8 Factual Information Review dated August 15, 2007 and the CellCyte Prospectus filed  
9 with the SEC in July 2007.

10 The Court declines to take judicial notice of the two remaining exhibits, which  
11 include (1) the extract list of companies from the Companies Registry, Grand Turk, and  
12 (2) downloaded pages from Yahoo! Finance on March 4, 2009 purportedly reflecting the  
13 price of CellCyte shares. Those documents are not relevant to the outcome of this  
14 motion.

15 **D. Application of the PSLRA to Plaintiffs' Allegations.**

16 **1. Securities Fraud under Section 10(b).**

17 Plaintiffs contend that defendants "engaged in a scheme to deceive the market"  
18 and the "scheme included . . . the promulgation of promotional material by Pierce that  
19 falsely touted [CellCyte's] success." SACC at ¶¶ 124, 150. However, the Supreme Court  
20 has rejected "scheme" or aider and abettor theories of liability under Section 10(b). See  
21 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008). Therefore,  
22 plaintiffs cannot prevail on a theory that all of the defendants engaged in a securities  
23 fraud scheme.

24 **a. No False Statements Attributable to Pierce.**

1 To survive a motion to dismiss, a PSLRA complaint must specify each false or  
2 misleading statement made by each particular defendant and the reasons why each one  
3 was false or misleading. 15 U.S.C. §78u-4(b)(1). Pierce contends that the SACC fails to  
4 identify any false or misleading statements made by him. Undisputedly, the SACC does  
5 not contain any direct quotes from Pierce. Instead, plaintiffs attempt to impute statements  
6 made by other defendants to Pierce under the group pleading doctrine. Under that  
7 doctrine, it is presumed that the allegedly false and misleading “group published  
8 information” is the “collective action of officers and directors.” In re GlenFed, Inc. Sec.  
9 Litig., 60 F.3d 591, 593 (9th Cir. 1995). Regardless of whether the doctrine survived the  
10 enactment of the PSLRA, it is inapplicable to these circumstances. Pierce was not a  
11 director, officer, or employee of CellCyte. Nor was he involved in the Company’s  
12 management or the dissemination of public information like SEC filings. Therefore, the  
13 group pleading doctrine cannot be used to attribute statements to Pierce.

14 Plaintiffs also allege that statements in the Rapholz brochure can be imputed to  
15 Pierce. Pierce counters that pursuant to a consulting agreement between Stock Group,  
16 AG and CellCyte, CellCyte was required to, and did, review all of the factual content for  
17 the brochure. Declaration of Ann Bender, (Dkt. #143) (“Bender Decl.”), Ex. A  
18 (consultant agreement states, in all capital letters, that “all . . . consultant prepared  
19 documentation concerning the company . . . shall be prepared by consultant from  
20 materials supplied to it by the company and shall be approved by the company in writing  
21 prior to any dissemination by the consultant”). The Rapholz brochure contains the  
22 following disclaimer: “The factual information contained in this Report specifically  
23 pertaining to CellCyte business, operations or financial records (the “CellCyte Facts”)  
24 have been reviewed and verified for accuracy by CellCyte.” Id., Ex. C at p. 26.



1 Consistent with those disclaimers, Reys approved the FIR document and all of the  
2 statements therein as factually accurate. On that basis, plaintiffs concede that none of the  
3 statements in the FIR, including those statements that were incorporated into the Rapholz  
4 brochure, is actionable against Pierce. Instead, plaintiffs contend that Pierce drafted  
5 additional falsities and included them, without CellCyte's approval, in the final Rapholz  
6 brochure. A comparison of the FIR and the Rapholz brochure reveals that many of the  
7 allegedly "new" falsities appear, verbatim, in the FIR. Only the following statements  
8 were not already in the FIR:

9 ● "Now, a practical 'pill-in-a-bottle' application **puts the miracle of regenerative**  
10 **medicine within immediate reach.**" SACC at ¶ 83 (only the words in bold were "new"  
to the Rapholz brochure).

11 ● "The technology is real. It's here now." Id.

12 ● "Repair your own heart . . . regenerative medicine in on the verge of an enormous  
13 and historic leap forward." Id.

14 ● "Grow-your-own repair tissues!" Id.

15 Plaintiffs contend that Pierce must have added those statements because they did  
16 not appear in the FIR. Even if that were true, the statements are not actionable against  
17 Pierce. The statements that "regenerative medicine is on the verge of an enormous and  
18 historic leap forward" and "the miracle of regenerative medicine [is] within immediate  
19 reach" are immaterial puffery. Such "loosely optimistic statements" reflecting corporate  
20 optimism are not actionable. See, e.g., City of Monroe Employees Ret. Sys. v.  
21 Bridgestone Corp., 399 F.3d 651, 671 (6th Cir. 2005) (explaining that statements are not  
22 actionable when they are "too squishy, too untethered to anything measurable, to  
23 communicate anything that a reasonable person would deem important to a securities  
24 investment decision") (citing numerous cases).

25 Furthermore, although the above statements are worded slightly differently, they

1 are entirely consistent with statements already contained in the FIR. Compare Rapholz  
2 Brochure (“Grow-your-own repair tissues!”) with FIR at p. 3 (“A heart attack victim  
3 could quite literally be able to grow new heart tissue and regain significant heart function  
4 with the use of their own stem cells.”). Plaintiffs also contend that the additional  
5 statements say “that CellCyte’s technology was already proven and that it had created  
6 products that would be produced and available for market immediately.” Plaintiff’s  
7 Opposition at p. 7 (citing SACC at ¶ 83). By approving the FIR, however, Reys approved  
8 statements to the effect that the technology was already proven: “CellCyte has a  
9 breakthrough patented technology” and citing successful pre-clinical studies. FIR at p. 2.  
10 Because Reys approved the factual accuracy of the statements, they are not attributable to  
11 Pierce.

12 Moreover, despite plaintiffs’ claim to the contrary, the Rapholz brochure did not  
13 state that the products were available for market immediately. In fact, the Rapholz  
14 brochure states that the technology could be available in “as soon as 3 to 5 years” and that  
15 the company had not yet filed an initial new drug application with the FDA. Rapholz  
16 Brochure at pp. 5, 7. The allegedly false statements must be read in context. See, e.g.,  
17 Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (“[I]f the alleged  
18 misrepresentation, in context, is such that no reasonable consumer could be misled, then  
19 the allegation may also be dismissed as a matter of law.”). Reading the statements in  
20 context, no reasonable investor would believe that the product was commercially  
21 available immediately as plaintiffs allege. Because the operative complaint fails to  
22 attribute any false or misleading statements to Pierce, it is subject to dismissal.

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24 **b. Lack of Scienter.**

1       Reys' verification of the factual content of the Rapholz brochure also renders  
2 implausible the allegation that Pierce knew the statements were false. Plaintiffs have  
3 cited no evidence to show that Pierce knew the statements were false. The SACC alleges  
4 that "he was reckless in failing to obtain such knowledge by refraining from taking those  
5 steps necessary to discovery whether those statements were false or misleading." SACC  
6 at ¶ 153. Plaintiffs, however, have cited no evidence to show that Pierce was responsible  
7 for determining whether the statements were false. In fact, the consulting agreement  
8 placed that responsibility solely with CellCyte. Legally, allegations that a defendant had  
9 access to contradictory information is insufficient to show scienter. See e.g., Lipton v.  
10 Pathogenesis Corp., 284 F.3d 1027, 1035-36 (9th Cir. 2002). As set forth above, the  
11 PSLRA requires more than mere negligence, a motive, or access to the truth. By failing  
12 to allege scienter sufficiently, the SACC fails to state a claim.

## 13       **2. Control Person Liability and Leave to Amend.**

14       In addition to the Section 10(b) claim, the SACC asserts a claim for "control  
15 person" liability against Pierce under Section 20(a), 15 U.S.C. § 78(a). To state a claim  
16 for control person liability, a plaintiff must adequately allege: (1) a primary violation of  
17 federal securities laws, and (2) that the defendant exercised actual power or control over  
18 the primary violator. See, e.g., Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th  
19 Cir. 2000).

20       In this case, plaintiffs concede that the SACC does not sufficiently plead that  
21 Pierce is a control person of CellCyte. In light of that concession, they seek leave to  
22 amend. Federal Rule of Civil Procedure 15(a)(2) directs federal courts to "freely give  
23 leave [to amend] when justice so requires." The Court has discretion to deny leave to  
24 amend when the record reveals "undue delay, bad faith or dilatory motive on the party of  
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1 the movant, repeated failure to cure deficiencies by amendments previously allowed,  
2 undue prejudice to the opposing party by virtue of allowance of the amendment, and  
3 futility of amendment.” Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th  
4 Cir. 2009) (internal citations and quotations omitted). Because the PSLRA is so technical  
5 and demanding, “the drafting of a cognizable complaint can be a matter of trial and  
6 error,” making it even more important to allow the filing of successive pleadings in this  
7 context. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).  
8 However, plaintiffs have already amended their complaint twice.

9       Plaintiffs seek leave to amend in two ways. First, they would amend to allege that  
10 Stock Group, AG is a primary violator and Pierce is secondarily liable as a controlling  
11 person of Stock Group, AG. Plaintiffs seek to add allegations that Pierce and Stock  
12 Group, AG authored the text of the Rapholz brochure as part of Stock Group, AG’s  
13 consulting agreement with CellCyte, that Pierce is a control person of Stock Group, AG,  
14 and that he is liable for that entity’s Section 10(b) violations. However, plaintiffs have  
15 not alleged any actionable misstatements or the requisite state of mind by Stock Group,  
16 AG. Instead, plaintiffs contend that Stock Group, AG, presumably via some unnamed  
17 person, is responsible for the same misstatements that they attribute to Pierce. As set  
18 forth above, Reys approved all of the factual content of the Rapholz brochure and the  
19 “added” statements are not actionable. For these reasons, the proposed amendment is  
20 denied as futile.

21       Second, during oral argument, plaintiffs requested leave to amend to include  
22 information found in two SEC complaints, one against Reys and the other against  
23 CellCyte and Berninger (collectively, the “SEC complaints”). The SEC complaints were  
24 filed on September 8, 2009 in the U.S. District Court for the Western District of  
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1 Washington. Specifically, the SEC complaints allege that in “late 2006,” CellCyte and a  
2 “Canadian stock promoter,” who is undoubtedly Pierce, “conducted a reverse merger  
3 between CellCyte and [a public] shell company,” which was controlled by Pierce, that  
4 made CellCyte a public company. SEC Complaint against CellCyte at ¶ 18.<sup>3</sup> As part of  
5 the reverse merger, CellCyte received approximately \$6 million and Pierce received  
6 approximately 15 million “purportedly ‘freely tradeable’ CellCyte shares. As a result, the  
7 stock promoter controlled about 90% of CellCyte’s public float (the shares outstanding  
8 and available for trading by the public).” Id. at ¶ 19. Based on those allegations,  
9 plaintiffs contend that Pierce was a control person of CellCyte because he controlled a  
10 large percentage of its stock. Plaintiffs have alleged only that Pierce was responsible for  
11 misrepresentations in the Rapholz brochure, which was published in the fall of 2007.  
12 However, plaintiffs’ SACC contends that CellCyte’s Prospectus filed with the SEC on  
13 July 11, 2007 stated that Pierce owned 2.7% of the company’s stock as of June 28, 2007.  
14 Id. at ¶ 23. According to plaintiffs’ own allegations and the company’s public filings,  
15 Pierce owned only a small percentage of the company’s stock at the time the Rapholz  
16 brochure was disseminated. Even if the Court also considered Pierce’s wife’s stock  
17 holdings, by plaintiffs’ own allegations Pierce controlled only 10% of the company’s  
18 stock at the relevant time. Id. An individual’s status as a minority shareholder is  
19 insufficient, without more, to establish control person liability. See, e.g., In re Gupta  
20 Corp. Sec. Litig., 900 F. Supp. 1217, 1243 (N.D. Cal. 1994); In re Flag Telecom Holdings  
21 Ltd. Sec. Litig., 308 F. Supp. 2d 249, 273-74 (S.D.N.Y. 2004) (explaining that the fact  
22 that an entity owned 30% of a company’s stock and helped found the company was  
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24 <sup>3</sup> According to the SEC complaint against Reys, the reverse merger officially  
25 closed in March 2007.

insufficient to establish control).<sup>4</sup>

In addition, the Court will not presume that Pierce exercised control based on his stock holdings. Rather, “[t]here must be some showing of actual participation in the corporation’s operation or some influence before the consequences of control may be imposed.” Burgess v. Premier Corp., 727 F.2d 826, 832 (1984) (internal citation and quotation omitted).<sup>5</sup> Other than noting Pierce’s stock holdings, plaintiffs have not sought to amend to allege any facts to show any actual participation in the company’s operations or influence over the same. Nor will the Court permit plaintiffs to conduct a fishing expedition in the hopes of finding material to support their vague request to amend. This case has been pending for over a year and a half, and plaintiffs have had ample time to conduct an investigation and formulate their contentions regardless of the SEC’s actions. For these reasons, plaintiffs’ request to amend their complaint is denied.

### III. CONCLUSION

For all of the foregoing reasons, defendant Pierce’s motion to dismiss (Dkt. #142)

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<sup>4</sup> See also Theoharous v. Fong, 256 F.3d 1219, 1227-28 (11th Cir. 2001) (dismissing control person claim against an individual who owned 39% of the company’s stock and could appoint four of nine directors); Aldridge v. A.T. Cross Corp., 284 F.3d 72, 85 (1st Cir. 2002) (declining to impose Section 20(a) liability on controlling shareholders where there was no evidence that they were “actively participating in the decisionmaking processes of the corporation”).

<sup>5</sup> See also No. 84 Employer-Teamster Joint Counsel Pension Trust Fund v. Am. West Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003) (explaining that whether defendant is a control person includes scrutiny of his or her participation in the company’s day-to-day operations and power to control corporate actions); see also 17 C.F.R. § 230.405 (defining “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”).

1 is GRANTED and the claims in the Second Amended Consolidated Class Action  
2 Complaint against defendant Pierce are hereby DISMISSED.

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4 DATED this 23rd day of September, 2009.

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7 Robert S. Lasnik  
8 United States District Judge  
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